

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Periodicals Classification Change

Docket No. MC99-3

**BRIEF OF THE ADVERTISING MAIL MARKETING ASSOCIATION
IN RESPONSE TO ORDER GRANTING POSTAL SERVICE MOTION TO
PROCEED WITHOUT EVIDENTIARY HEARINGS**

The Advertising Mail Marketing Association ("AMMA") hereby submits its brief in response to the Postal Rate Commission's ("Commission") May 14, 1999 Order (Order No. 1243) granting the United States Postal Service's ("Postal Service") request to proceed without evidentiary hearings in this proceeding. The Commission's Order also invited the parties to brief the question of the Commission's authority to address in its recommended decision in this proceeding the timing of postage refunds, which the Postal Service has determined to provide to certain reduced-rate mailers affected by the anomaly that is the subject of this proceeding.¹ The core question is more fundamental: Faced with a mistake that results in postage rates that are, in effect, greater than the law intended or allows, may the Commission speak to the problem, or must it

¹ Specifically, the Commission indicated that it wished to "allow participants to challenge the Service's contention that . . . the Commission has no authority to include as part of its recommended decision any limitation on the timing of rate implementation." Order No. 1243 at 8-9. The Postal Service raised this argument in comments it submitted regarding AMMA's response to the Postal Service's request to forego hearings. See Comments of the United States Postal Service on AMMA Pleading Regarding the Need for Hearings in this Docket (May 10, 1999) (hereinafter "Postal Service Comments"); Response of the Advertising Mail Marketing Association to Postal Service Motion to Forego Hearings (May 7, 1999) (hereinafter "AMMA Response").

remain silent regarding an appropriate measure to help address the problem. AMMA appreciates the opportunity to present its views on this important issue.

The circumstances that give rise to this proceeding are extremely unusual, and by all appearances unintentional. AMMA is also mindful of the limitations on the respective duties and powers of the Board of Governors and the Commission, and the importance of maintaining the balance and allocation of duties established by Congress in the PRA. Yet, the rates and rate structure that produce the anomaly that led to this proceeding were and are invalid because they are contrary to the principles of the Postal Reorganization Act of 1970, as amended, 39 U.S.C. § 101 et seq. (the "PRA" or "Act"). In this situation, consistent with the PRA, the Commission has the ability and the duty to alert the Governors to the arbitrariness of the Postal Service's selection of a date on which mailers affected by the anomaly may be eligible for refunds. The Commission may be constrained in the *manner* in which it raises the issue; a formal "recommendation" may exceed Commission authority. But, the Commission can act, and it should.

I. THE POSTAL SERVICE LIMITATION ON REFUNDS IS ARBITRARY

As a creature of law, the Postal Service and the Governors that manage it can lawfully act only within the bounds of their statutory authority. Thus, a postal rate or mail classification that contravenes the PRA is, by definition, invalid. See, e.g., Dow Jones & Co., Inc. v. U.S. Postal Serv., 656 F.2d 786, 211 U.S. App. D.C. 197 (D.C. Cir. 1981) (Governor's decision declared void in its entirety because approved rates were established in violation of 39 U.S.C. § 3622);

Combined Comm. Corp. v. U.S. Postal Serv., 686 F. Supp. 663, 669 (M.D. Tenn. 1988) ("any change in the DMCS which is not made pursuant to a recommendation by the PRC in accordance with the reclassification procedures set forth in 39 U.S.C. § 3623 is invalid"), aff'd, 891 F.2d 1221, 1230 (6th Cir. 1989) (because Postal Service lacked statutory power to alter eligibility criteria for second-class rates, DMM section purporting to do so was "void").

The PRA requires that qualified mailings, generally by non-profit organizations, bear a smaller portion -- at this point, one-half -- of Postal Service institutional costs than the corresponding regular-rate categories. 39 U.S.C. § 3626. The purpose of this requirement, reflected in the "Reduced rates" heading of the section, is to ensure that non-profit or other qualified organizations that mail educational materials or similar publications will generally enjoy lower rates than Regular-rate mailers. See, e.g., H. Rep. No. 93-1084, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 3406, 3408. As a result, however, of rate changes approved in the last omnibus postal rate proceeding, Docket No. R97-1, the Non-Profit and Classroom rates for certain publications in the Periodicals class are *higher* than the corresponding Regular rates. See Request of the United States Postal Service for a Recommended Decision on Periodicals Classification Change (hereinafter "USPS Request") (April 9, 1999) at 1-2. The non-profit rates affected by the anomaly are, therefore, contrary to the policies of the PRA. In a word -- since January 10, 1999, the "Postal Service is charging rates which do not conform to the policies set out in" title 39, and the rates are not "in accordance with the policies" of title 39. 39 U.S.C. § 3662.

AMMA is confident that the Governors, the Postal Service, and this Commission all could have and would have, had they been aware of the problem, taken appropriate steps during their respective participation in the last rate case to correct the anomaly, before the Board of Governors implemented the new rates on January 10, 1999. But that did not happen. The result is that the current rates conflict with the principles of PRA, and have since they took effect.

The Postal Service has, at least tacitly, conceded the point in its initiation of the instant classification proceeding to redress the effects of the anomaly. The refund program likewise confirms the legal deficiency of the rates. The Postal Service compares the proposed refund procedures to those applicable when a mailer has an application for preferred rates pending. The USPS Request at 2, fn. 1. The general *standard* for the issuance of refunds of postage and fees, however, provides that a refund may be made if the Postal Service fails to render service, or “if the amount collected was more than the lawful rate.” DMM P014.2.1a. In sum, the Postal Service itself concedes that it has been changing more than the “lawful” rate and therefore concedes that refunds are proper.

The problem is that refunds, under the Postal Service’s plan, would be available only for postage paid on or after April 9, 1999, when the Postal Service submitted the request for a recommended decision under consideration in this docket. The Postal Service has offered no justification for restricting the refund program to this limited period, and excluding mailers who were subjected to

impermissibly high rates beginning the very first day the new rates took effect. The non-profit rates in question were invalid -- became inconsistent with the policies of the Act -- when they were implemented on January 10, 1999; they did not suddenly become invalid on April 9, 1999 when the Postal Service decided to take steps to address the problem.

Even if the Commission does not conclude in this context that the rates affected by the anomaly are invalid, the Postal Service' approach is unfounded. There is indisputably a unique and serious defect in the rates that resulted from Docket R97-1. The anomaly and its attendant financial consequences did not leap to existence the day that the Postal Service initiated this classification proceeding; they existed the moment the new rates took effect on January 10, 1999. The Postal Service's refund plan ignores the fact that certain mailers were forced to pay rates that are higher than permitted as of January 10th. It asks this Commission, the Governors, and mailers to pretend that the anomaly did not exist until the Postal Service acknowledged it and, in this proceeding, took steps to address it on April 9th.

There is no rational basis for the Postal Service to impose this restriction on refund eligibility. The publications affected by the anomaly offer unique public interest benefits based on their high editorial content. Moreover, they have little advertising revenue to provide a buffer against the economic impact of the "anomaly." The cost of making refunds available from January 10th, on the other hand, would have a minimal economic impact on the Postal Service. Making refunds available from January 10, 1999 can be estimated to cost the Postal

Service, at most, an additional \$1.25 million. See Office of the Consumer Advocate Response to Motion of the United States Postal Service for Expedition and Waiver of Certain Provisions of Rule 64(h), at 4.

II. THE COMMISSION HAS THE POWER TO ACT

The Commission is not required to sit silently by while the Postal Service arbitrarily ignores the financial harm suffered by mailers who may have paid too much for postage between January 10th and April 9th. There was a mistake in Docket R97-1, it produced invalid (and certainly “anomalous” rates), and the Postal Service’s response, albeit a step in the right direction, falls short of the mark because its refund program is arbitrary and analytically flawed. It is also fair to say that because the Postal Service made its refund program “conditional” on the Commission’s recommendation and the Governors’ approval of its classification proposal, the Postal Service has invited the Commission to comment on its refund program. USPS Request at 2, fn. 1. AMMA does not contend that the Commission is authorized to *order* the Postal Service or the Governors to provide refunds, or that they are otherwise required to offer refunds. See, e.g., 39 U.S.C. § 3681; Complaint of Lifetime Fitness, Order Dismissing Complaint, Docket No. C98-1, Order No. 1227 (January 27, 1999). Indeed, there is some authority indicating that the Postal Service retains discretion to decide whether or not it will issue refunds even if a postage overpayment is based on invalid rates. Westwood Promotions, Inc. v. U.S. Postal Serv., 718 F. Supp 690 (N.D. Ill. 1989); Combined Comm., 686 F. Supp. at 670-71. The Board of Governors is exclusively authorized to establish the

effective date for any new rates, fee, or classification. 39 U.S.C. § 3625(f). To the extent that the issuance of refunds is a management or operational decision, the Commission does not have the authority to issue a *formal* “recommendation” that refunds be issued, or mandate that they be provided as of a particular date. See, e.g., Mail Order Assoc. of America v. U.S. Postal Serv., 2 F.3d 408, 424, 303 U.S. App. D.C. 139 (D.C. Cir. 1993) (“MOAA”).

But that is not the issue. Rather, the question is whether the Commission is required to remain silent in the face of an arbitrary management decision to limited refunds to a specific time interval. The law does not silence the Commission on this subject. The Commission is duty-bound to assess the equity and fairness of Postal Service proposals. MOAA, 2 F.3d at 423 (“During the course of a ratemaking proceeding, the Commission has the authority, and indeed the duty, to assess the fairness and equity both of the proposals before it and of its own recommended decision.”). And ultimately, the Commission is required to “make a recommended decision on establishing or changing the schedule in accordance with the policies of this title.” 39 U.S.C. § 3623 (emphasis added). The policies reflected in title 39 do not exclude management or operational issues, which are often – as here – integral to rate and classification matters.

This is precisely what the Commission did in the last rate case, Docket R97-1. The Commission was concerned that the Postal Service planned to implement rate hikes before it was necessary, and made its views clear. The Commission explained that:

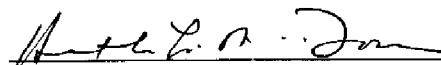
The Commission recommends a one-cent increase in the price of a First-Class letter, and similar small changes to the rates applicable to other categories of mail. . . . The Commission joins the many mailers that have participated in this proceeding in urging the Governors of the Postal Service to delay increasing rates until additional revenues are needed to offset actual (as opposed to planned) expenditures."

Docket R97-1, Opinion and Recommended Decision, at ii-iii (emphasis added). Thus, the Commission spoke to a management issue -- the timing of the increase -- without doing violence to the delicate regulatory balance of powers between the Governors and the Commission.

The issues in this docket are no less compelling. The Postal Service's refund plan would help relieve some of the financial burden that affected non-profit mailers are facing, but the program is arbitrarily and, therefore, unfairly limited, in duration. This an extraordinary situation, and in the circumstances, the Commission can and must exercise its responsibility under the PRA to assess the lawfulness, fairness, and equity of the Postal Service's proposal, which is explicitly tied to the refund program. Thus, the Commission must not only present to the Governors its formal recommendation on the classification change, but also bring to the Governors' attention the arbitrary nature of the Postal Service's refund program. The Commission will thereby fulfill its responsibilities under the PRA and, by promoting better-informed decision-

making, best enable the Governors to fulfill their duty to establish reasonable, equitable, and lawful rates and classifications.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Heather L. McDowell", is written over a horizontal line.

Ian D. Volner
Heather L. McDowell
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Avenue, N.W.
Suite 1000
Washington, DC 20005-3917

Counsel to Advertising Mail Marketing
Association

May 24, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of May, 1999 served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.

Keith L. McDown